

Jahna M. Lindemuth
Alaska Bar No. 9711068
Scott M. Kendall
Alaska Bar No. 0405019
Holmes Weddle & Barcott, P.C.
701 West 8th Avenue, Ste. 700
Anchorage, AK 99501
Phone: 907.274.0666
Fax: 907.277.4657

Attorneys for Plaintiff Alaska State Hospital and Nursing Home Association

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

ALASKA STATE HOSPITAL AND
NURSING HOME ASSOCIATION, an
Alaska non-profit corporation,

Plaintiff,

v.

STATE OF ALASKA, DEPARTMENT
OF HEALTH AND SOCIAL
SERVICES,

Defendant.

Case No. 3AN-19-8244 CI

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Plaintiff Alaska State Hospital and Nursing Home Association ("ASHNHA"), an Alaska non-profit corporation, by and through counsel of record, Holmes Weddle & Barcott, P.C., hereby moves for a preliminary injunction to enjoin Defendant State of Alaska, Department of Health and Social Services ("DHSS") from enacting and/or enforcing its emergency regulations and proposed permanent regulations changing 7 AAC 145, 7 AAC 150, 7 AAC 160 and 7 AAC 190. ASHNHA can show probable success on

the merits entitling it to a preliminary injunction without a showing of irreparable harm. As set forth in the Motion for Summary Judgment filed herewith, the emergency regulations and proposed permanent regulations are inconsistent with both state and federal law, are arbitrary and violate due process as a matter of law. But even if the law were not so clear, ASHNHA would be entitled to a preliminary injunction because these emergency regulations and proposed permanent regulations will cause severe irreparable harm to Alaska's Medicaid beneficiaries and the entire Medicaid system as providers are forced to reduce services, including behavioral health services; specialized physicians leave the state (or refuse to come); emergency room visits increase; and access to care is negatively impacted as providers ultimately turn Medicaid recipients away. In the end, it is expected that these cuts will actually increase the state's costs to serve the Medicaid beneficiary population. This Motion is supported by the Affidavit of Becky Hultberg, Affidavit of Preston Simmons, Affidavit of Timothy Bateman, MD, and Affidavit of Allison Lee, filed herewith.

I. BACKGROUND

The background to this dispute is set forth in the Motion for Summary Judgment, and that Motion is adopted herein in its entirety.

II. STANDARDS OF REVIEW

A. Preliminary Injunction

Alaska Rule of Civil Procedure 65 governs preliminary injunctions. A plaintiff may obtain a preliminary injunction by meeting one of two standards: the heightened

“probable success on the merits” standard or the more lenient “balance of hardships” standard.¹ “Where the injury from [a] preliminary injunction is not inconsiderable and may not be adequately indemnified by a bond, a showing of probable success on the merits is required before a . . . preliminary injunction can be issued.”² “The balance of hardships standard requires balancing the harm plaintiff will suffer without the injunction against the harm the injunction will impose on the defendant.”³ The court may issue a preliminary injunction under the balance of hardships standard “when three factors are present: (1) the plaintiff must be faced with irreparable harm; (2) the opposing party must be adequately protected; and (3) the plaintiff must raise serious and substantial questions going to the merits of the case; that is, the issues raised cannot be frivolous or obviously without merit.”⁴

III. ARGUMENT

A. Plaintiff ASHNHA Can Show Probable Success on the Merits Because the Emergency Regulations and Proposed Permanent Regulations Are Invalid as a Matter of Law.

If this Court promptly grants the Motion for Summary Judgment, a permanent injunction giving effect to this Court’s legal rulings should follow. But if there is delay in deciding the summary judgment motion, this Court should issue a preliminary injunction enjoining the rate adjustments while the motion is pending. Even if the State would suffer

¹ See, e.g. *Alsworth v. Seybert*, 323 P.3d 47, 54 (Alaska 2014).

² *North Kenai Peninsula Road Maintenance Service Area v. Kenai Peninsula Borough*, 850 P.2d 636, 639 (Alaska 1993).

³ *Alsworth*, 323 P.3d at 54.

⁴ *Id.* at 54 (internal citations and quotations omitted).

harm from the preliminary injunction that may not be adequately indemnified by a bond, ASHNHA is entitled to a preliminary injunction because it can show probable success on the merits.⁵ As discussed at length in the Motion for Summary Judgment (which is adopted herein in full), the law is very clear that the emergency regulations and proposed permanent regulations are invalid as a matter of law.

As a matter of federal law, DHSS cannot change reimbursement rates through regulation until CMS has approved those rate changes in a State Plan Amendment (“SPA”) approval process under the standards set forth in §30(A) of the Medicaid Act.⁶ The emergency and proposed permanent regulations for facilities are also invalid as a matter of state law because they are inconsistent with the legislature’s policy directive in AS 47.07.070 to pay facilities rates based upon the “reasonable costs related to patient care.” And because DHSS failed to consider the effects of the rate changes on the efficiency, economy, quality of care, and access to care for Medicaid recipients as required by federal law, as well as the costs of care for facilities as required by state law, all of the rate changes are invalid because they are arbitrary and unreasonable. The emergency regulations are also invalid as a violation of due process and because there is no actual valid emergency.

The Ninth Circuit considered a similar case and reversed the lower district court for failing to issue a preliminary injunction. In *The ARC of California v. Douglas*,⁷ the State of California attempted to implement a 3% across the board reduction with additional

⁵ *North Kenai Peninsula Road Maintenance Service Area*, 850 P.2d at 639.

⁶ 42 U.S.C. § 1396a(a)(30)(A).

⁷ *The ARC of California v. Douglas*, 757 F.3d 975, 987 (9th Cir. 2014).

changes to holiday and half-day billing in the payment of services for developmentally disabled individuals under the Medicaid program. The Ninth Circuit held that the district court abused its discretion in denying a preliminary injunction because The ARC had shown a likelihood of success on the merits under §30(A).⁸ “By adopting those policies without studying at all their likely effects on the efficiency, economy, quality of care, and access to care California offered the developmentally disabled, the state officials probably disregarded Section 30(A)’s express mandate.”⁹ A preliminary injunction should also issue in this case under the probability of success standard if there is delay in granting the Motion for Summary Judgment.

B. ASHNHA Is Entitled to a Preliminary Injunction Because Medicaid Beneficiaries Will Suffer Irreparable Harm Far Exceeding Any Harm to the State.

Even if the law were not so clear, ASHNHA is entitled to a preliminary injunction enjoining the rate reductions from going into effect. “The balance of hardships standard requires balancing the harm plaintiff will suffer without the injunction against the harm the injunction will impose on the defendant.”¹⁰

At a minimum, ASHNHA has raised serious and substantial questions going to the merits of the case in its Motion for Summary Judgment. The irreparable harm that the Medicaid beneficiaries and the Medicaid system as a whole will suffer is outlined in the

⁸ *Id.*

⁹ *Id.*

¹⁰ *Alsworth*, 323 P.3d at 54.

affidavits of Becky Hultberg, Preston Simmons, Timothy Bateman, MD, and Allison Lee, filed herewith.

Overall Impact: Over 200,00 Alaskans (nearly 30% of the state's population) are covered by Medicaid. Hultberg Afft., ¶16. Of that number, nearly 100,000 are children aged 18 or less. *Id.* DHSS has estimated that the rate cuts will save the State over \$100 million by shifting these losses to providers. *Id.* at ¶8 and Exhibit D. DHSS's announcement of rate cuts and inflationary freezes will force the providers who serve this population to deal with a nearly 7% cumulative rate cut on three days' notice. *Id.* at ¶7. These cuts will result in reimbursement to many providers that is below the actual cost of providing the care. *Id.* These cuts will harm those providers, especially those with a high volume of Medicaid patients. *Id.* at ¶¶10, 11. Some providers may be able to absorb cuts by shifting the costs to other payers. *Id.* Others, particularly those in Fairbanks and Juneau, may lack the ability to do so, which will potentially cause them to reduce the level of service in their communities. *Id.* at ¶11. Over the past several years, a combination of rate cuts and freezes has already resulted in reimbursement for physician specialists over 20% below what it was several years ago. *Id.* at ¶12. This new rate reduction and freeze could result in the complete loss of certain types of medical specialties in Alaska. *Id.* Chief among these losses will be loss in behavioral health services—and loss of such services will lead to increased boarding of behavioral health patients in emergency rooms or jail. *Id.* at ¶13. In addition to the increase societal and public safety consequences of this shift, the actual costs to the state of dealing with these issues will only increase. *Id.*

Access to Care, Including Specialized Care: Due to high rates of Medicaid patients and the federal law requirements that all hospitalized patients receive service regardless of their ability to pay, hospitals and emergency physicians will have to absorb the cost of these cuts. Bateman Afft. at ¶3. This will directly impact the ability to recruit and retain physicians in Alaska, negatively impacting Alaskans' access to care. *Id.* Pediatric specialties will be especially hard hit, as we are already facing critical workforce shortages causing many Alaska clinics to rely on and to share traveling physicians. Simmons Afft., at ¶3. There is a very fragile network of pediatric specialists. With these rate reductions, many of these traveling physicians are reconsidering whether to serve in Alaska, rather than just serve their existing caseloads at home. *Id.* at ¶7.

Many private clinics are already reducing the number of Medicaid patients they will serve, or are simply refusing to service Medicaid patients at all. *Id.* at ¶8. The rate cuts will accelerate this problem, which is causing increased demand on larger providers such as Providence Medical Group. *Id.* The rate cuts now challenge Providence's own ability to provide these services to Alaskans. Providence faces not being reimbursed for the cost of services delivered. *Id.* at ¶9. Given the large number of Medicaid patients Providence serves, and the lack of notice of these cuts, the impact to Providence will be significant, without time to plan for that impact. *Id.* If large providers such as Providence cannot continue to meet the demand for Medicaid services, such as care for children with chronic illnesses, Alaskans will have to travel to Seattle or other west coast cities for even routine

appointments, case management and treatment. *Id.* at ¶8. These rate reductions are actually likely to increase costs to the state in the long run. *Id.*

Delays in Hospital Discharges and Increased Emergency Room Visits:

Additionally, these cuts will delay the ability to connect hospitalized patients with outpatient resources. Bateman Afft. at ¶4. This situation will lead to delayed discharges and avoidable readmissions. These increased repeat visits to the emergency room will negatively impact patient health and further drive up healthcare costs. *Id.*

Behavioral Health Services: Behavioral health services will be especially hard hit.

For example, North Star Behavioral Health (“NSBH”) is a facility that serves the Anchorage area for children, teens, and adults who suffer from psychiatric or substance abuse issues. Hultberg Afft. at ¶15. NSBH also provides military-specific care to first responders, veterans, and dependents at the Chris Kyle Patriots Hospital. *Id.* Like many behavioral health providers, the vast majority of NSBH’s revenue, 80%, is from the Medicaid program. *Id.* Accordingly, DHSS’s cut in Medicaid reimbursement rates will mean NSBH must reduce or eliminate treatment services. *Id.* Given the high demand for these services, and given that other similar facilities will also be eliminating or reducing services, DHSS’s rate cuts will cause many Alaskans to lose access to behavioral health services. *Id.*

Personal Care Services: By providing in-home care, home and community based personal care services (“PCS”) delay seniors and those with disabilities from having to move into more expensive facility-based care, such as the Pioneer Homes and other skilled

nursing homes. Lee Afft. at ¶3. PCS is primarily funded by Medicaid. *Id.* Rate cuts will force the 18 agencies and organizations in Alaska providing these services to reduce or eliminate higher cost service areas, such as Delta Junction, Ketchikan, Prince of Wales Island, and especially rural areas such as Western Alaska. *Id.* at ¶¶4, 6. In one case the rate reduction will cause the cancellation of a planned expansion of services to a large underserved part of Alaska. *Id.* at ¶4a. It will also cause outright closures and exacerbate existing workforce retention and shortage problems. *Id.* at ¶4c, d. Overall, a rate reduction will decrease access to PCS and, in the longer term, cause higher medical and long-term care expenditures for the state. *Id.* at 3.

In summary, the State cannot “save” \$100 million by shifting the costs of services to the Medicaid providers by failing to properly reimburse providers and facilities without negatively impacting the entire Medicaid system. This State and the Medicaid beneficiaries will lose access to care, including much needed behavioral health services and specialized services. Children under 18 who comprise 46% of our Medicaid population will be especially hard hit. In the end, these short-sighted cuts will actually increase the cost of care in many areas, leading to long-term increased Medicaid costs for the State.

The public process required by both federal and state law has not been followed. If it had been followed, stakeholders and the public could have weighed in with the State formally and on-record with this critical information about the actual impacts of these rate reductions. Hultberg Afft. at ¶11. Providers must be afforded this opportunity so that the

State can assess the true impacts to Alaskans in quality of life, public safety, access to care, and actual costs.


In contrast, the only potential harm to the State from a preliminary injunction is the short delay, while the merits of this case are under consideration, to the implementation of rate reductions if they were ultimately to be found to be valid. Balanced against the harm the Medicaid beneficiaries and the entire Medicaid system face, this potential harm is negligible.

IV. CONCLUSION

Because Plaintiff ASHNHA has shown probable success on the merits, it is entitled to a preliminary injunction without a showing of irreparable harm. The emergency regulations and proposed permanent regulations are inconsistent with both state and federal law, are arbitrary and violate due process as a matter of law. But even if the law were not so clear, ASHNHA is entitled to a preliminary injunction because these emergency regulations and proposed permanent regulations will cause severe irreparable harm to Alaska's Medicaid beneficiaries and the entire Medicaid system. In the end, these cuts will actually increase the costs to serve the Medicaid beneficiary population as Alaskans have to leave the state for health care services. The Motion for Preliminary Injunction should be granted.

RESPECTFULLY SUBMITTED at Anchorage, Alaska this 12th day of July
2019.

HOLMES WEDDLE & BARCOTT, PC
Attorneys for Plaintiff Alaska State Hospital
and Nursing Home Association

By: 
Jahna M. Lindemuth
Alaska Bar No. 9711068
Scott M. Kendall
Alaska Bar No. 0405019

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of
July 2019, a true and correct copy
of the foregoing was sent to the following
via U.S. Mail and Email:

Stacie Kraly, Esq.
Lael Harrison, Esq.
Attorney General's Office
P.O. Box 110300
Juneau, AK 99811
stacie.kraly@alaska.gov
lael.harrison@alaska.gov


Brian Fontaine

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657